CHANG CHONG FOO & ANOR.

v.

SHIVANATHAN PERUMAL

SUPREME COURT, KUALA LUMPUR
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
PEH SWEE CHIN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-340-90]
12 AUGUST 1992

STATUTORY INTERPRETATION: *Section 28A(2)(c)(iii) of Civil Law Act 1956 - Meanings of "such amount", "diminution" and "living expenses" referred in (iii) considered.*

TORT: *Appellant pleaded guilty to charge of dangerous driving - Whether proper for trial Judge to admit evidence of plea of guilty by appellant in civil proceedings - Finding of negligence did not rest entirely on admission of plea of guilty - Trial Judge considered totality of evidence before the Court - Living expenses - Section 28A(2)(c)(iii) of Civil Law Act 1956 - Method of assessing damages in fatal accident cases and personal injury cases - Living expenses of respondent at the time he was injured.*

Two main issues were raised in this running down case:

(1) Whether it was proper for the learned trial Judge to admit the evidence of the plea of guilty by the appellant, at the traffic case.

(2) Whether s. 28A of the Civil Law Act 1956 is clearly intended for a living plaintiff and if living expenses of the plaintiff is deductible under s. 28A(2)(c)(iii) of the said Act.

Held:

[1] Although it was proper for the learned Judge to admit the evidence of the plea of guilty by the appellant/defendant in this case, the finding of negligence against the appellant did not rest entirely on the admission of this evidence but on the totality of the evidence before the Court.

[2] On the evidence as a whole the learned Judge's finding that the appellant was 100% to be blamed for the accident was affirmed.

[3] Section 28A of the Civil Law Act 1956 is clearly intended for a living plaintiff and therefore s. 28A(2)(c)(iii) of the Act applied to the facts of this case. In fact the intention of the legislature was that in awarding damages for the loss of future earnings the entire sum of the plaintiff's earnings should not be used to calculate the amount payable under subsection 2(c) of the said Act.

[4] The meaning of "such amount" referred to in s. 28A(2)(c)(iii) is the amount of his earnings at the time of the injury referred to in s. 28A(2)(c)(ii). The "diminution" referred to in (iii) is the "living expenses" of the plaintiff at the time he was injured. The Court considered the ordinary meaning of "living expenses" in (iii) by referring to the *Shorter Oxford English Dictionary* which defines "living" as: "The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance". "Expenses" means "money out of pocket".

[5] The term "living expenses" in s. 7 and s. 28A of the Civil Law Act 1956 bear the same meaning.

[Appeal against liability dismissed. Appeal on quantum allowed. Post trial loss of earnings reduced upon deducting the living expenses of the respondent.]

[**Bahasa Malaysia** Translation of Headnote]

PENTAFSIRAN STATUT: *Seksyen 28A(2)(c)(iii) Akta Undang-Undang Sivil 1956 - Makna "amaun sedemikian", "pengurangan" dan "sara hidup" yang dirujukkan dalam (iii) dipertimbangkan.*

TORT: *Perayu mengaku bersalah ke atas tuduhan memandu secara merbahaya - Sama ada wajar bagi Hakim perbicaraan untuk menerima keterangan akuan bersalah oleh perayu dalam prosiding sivil - Kedapatan kecuaian tidak sepenuhnya bergantung atas penerimaan akuan bersalah tersebut - Hakim perbicaraan menimbangkan keseluruhan keterangan yang dibentangkan di hadapan Mahkamah - Sara hidup - Seksyen 28A(2)(c)(iii) Akta Undang - Undang Sivil 1956 - Cara mentafsirkan ganti rugi dalam kes - Kes kemalangan maut dan kes-kes kecederaan diri - Sara hidup responden sewaktu beliau tercedera.*

Dalam rayuan kes pelanggaran ini dua perkara utama dibangkitkan:

(1) Sama ada ianya wajar bagi Hakim perbicaraan yang arif untuk menerima keterangan akuan bersalah oleh perayu dalam lalulintas.
(2) Sama ada seksyen 28A Akta Undang-Undang Sivil 1956 dengan jelas bertujuan untuk seorang plaintif yang masih hidup dan jika sara hidup plaintif boleh dipotong di bawah s. 8A(2)(c)(iii) Akta tersebut.

Diputuskan:

[1] Walaupun ianya adalah wajar bagi Hakim yang bijaksana untuk menerima keterangan akuan bersalah oleh perayu/defendan dalam kes ini, kedapatan kecuaian terhadap perayu tidak sepenuhnya bergantung kepada penerimaan keterangan ini tetapi pada keseluruhan keterangan yang dibentangkan di depan Mahkamah.

[2] Berdasarkan kepada keseluruhan keterangan, kedapatan Hakim yang bijaksana bahawa perayu adalah dipersalahkan 100% di atas kemalangan tersebut disahkan.

[3] Seksyen 28A Akta Undang-Undang Sivil 1956 dengan jelas bertujuan bagi seorang plaintif yang masih hidup dan dengan itu s. 28A(2)(c)(iii) Akta tersebut terpakai kepada fakta-fakta kes ini. Malah, tujuan perundangan tersebut adalah bahawa dalam mengawardkan ganti rugi bagi kehilangan mata pencarian masa hadapan, keseluruhan jumlah pendapatan plaintif tidak harus digunakan untuk menghitung jumlah yang perlu dibayar di bawah subseksyen 2(c) Akta tersebut.

[4] Maksud "amaun sedemikian" yang diperujukkan dalam s. 28A(2)(c)(iii) ialah jumlah mata pencariannya sewaktu kecederaan yang diperujukkan dalam s. 28A(2)(c)(iii). "Pengurangan" yang diperujukkan dalam (iii) ialah "sara hidup" plaintif sewaktu beliau cedera. Mahkamah telah menimbangkan maksud biasa "sara hidup" dalam (iii) dengan merujuk kepada *Shorter Oxford English Dictionary* yang mana mentafsirkan "living" sebagai: "The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance". "Expenses" bermaksud "Money out of pocket".

[5] Istilah "living expenses (sara hidup)" dalam s. 7 dan s. 28A Akta Undang-Undang Sivil 1956 mempunyai makna yang sama.

[Rayuan terhadap liabiliti ditolak. Rayuan ke atas kuantum dibenarkan. Kehilangan mata pencarian selepas perbicaraan dikurangkan setelah pemotongan sara hidup responden.]

Cases referred to:
Lim Ah Toh v. Ang Yau Chee & Anor. [1969] 2 MLJ 194 ***(refd)***
Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors. [1966] 1 MLJ 120 ***(foll)***
Tan Kim Chuan & Anor. v. Chandu Nair a/l Krishna Nair [1991] 1 CLJ (Rep) 441 ***(refd)***
Amar Singh v. Chin Kiew [1960] MLJ 77 ***(refd)***
Harris v. Empress Motors Ltd. & Cole v. Crown Poultry Packers Ltd. [1983] 3 All ER 561 ***(refd)***
White v. London Transport Executive [1982] 1 All ER 410 ***(refd)***
P.R. Panickar v. Chwee May Kwong & Anor. [1958] MLJ 136 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(3)(iv)(c), 28A, 28A(1), (2), (2)(c)(iii)

Other source referred to:
Shorter Oxford English Dictionary

For the appellants - R.K. Nathan; M/s. R.K. Nathan & Co.
For the respondent - S. Gunasegaran; M/s. Guna & Co.

JUDGMENT

Harun Hashim SCJ:

The plaintiff was riding a motor-cycle along a straight stretch of road when a car driven by the defendant in the opposite direction collided into him. According to the plaintiff when he first saw the car it was overtaking another vehicle and had encroached on his side of the road. He took evasive action by swerving to the left on to the side-table but it was too late. The learned Judge accepted the evidence of the plaintiff and his version as to how the collision occurred and held the defendant 100% to blame for the accident. He said he was fortified in his finding by the fact that the defendant had pleaded guilty in the Magistrate's Court to a charge of dangerous driving and had been convicted of that charge.

It was argued, however, that if the learned Judge had accepted the evidence of the plaintiff, he should have also accepted that part of evidence where the plaintiff admitted in cross-examination that he had made an error of judgment in thinking at the time that the defendant would be able to overtake in time and avoid a collision. If the learned Judge had done so, he would have held that the plaintiff was 30% to blame for the accident.

The damage to the motor-cycle was largely on the off-side. This would be consistent with the plaintiff's version that the collision occurred as he swerved to the left. The plaintiff himself was injured on his right leg. So was the plaintiff's pillion rider whose injuries were also on the right side of the body and a broken neck which caused his death on the same day. The defendant's car came to a stop after the collision on the side-table on the plaintiff's side of the road.

In *Lim Ah Toh v. Ang Yau Chee & Anor.* [1969] 2 MLJ 194 Raja Azlan Shah J (as he then was) said at p. 195:

> When a motor vehicle collides with an oncoming vehicle on the wrong side of a straight stretch of road, that is *prima facie* evidence of negligence. See *Menon v. Pigeonneau* and *Tan Giok Hue v. Lim Swee Peng.* The onus is therefore upon the defendants to show that the motor-van found itself where it did without any negligence on their part.

In the instant case, the defendant did not give evidence at the trial. The defence relied entirely on the 'admission' of the plaintiff in cross-examination that he committed an error of judgment and therefore was partly to blame for the accident. This is what he said:

> At time of collision my motor-cycle was in motion. I saw a car and took evasive action. The car was very close by and so I could not avoid. I thought the car could overtake and completed overtaking safely. I was wrong. My vision was slightly affected by the rain.

Earlier on, also in cross examination, he said:

> When the car was about 3¼ chains I tried to avoid the accident by swerving to the left. I swerved the minute I saw the car.

On examination of the evidence as a whole, we are of the view that the so-called admission of error of judgment is only a suggestion of such a possibility because throughout his evidence, the plaintiff said he took evasive action on sight of the defendant's oncoming car.

With regard to the learned Judge's admission of the fact that the defendant had pleaded guilty to a charge of dangerous driving we would refer to two decisions of Raja Azlan J (as he then was):

In *Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors.* [1966] 1 MLJ 120 where he said at p. 121:

> Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the Plaintiff's case and which weighs against the fourth defendant: See *Noor Mohamed v. Palanivelu.*

And in *Lim Ah Toh v. Ang Yau Chee & Anor.* (*supra*) where he said at p. 196:

> The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: See *Noor Mohamed v. Palanivelu*; *E.A. Long v. Wong Chin Wah.*

We are of the view that it was proper for the learned Judge to admit the evidence of the plea of guilty by the defendant in this case. We are also of the opinion that the learned Judge's finding that the defendant was wholly negligent did not rest entirely on the admission of this evidence but on the totality of the evidence before him. On the evidence as a whole, we agree with the learned Judge's finding that the defendant was 100% to blame for the accident. The appeal on the point of negligence is thus dismissed.

The plaintiff was 24 years old at the time of the accident. He was a temporary daily-rated worker at a palm oil mill as a kernel meal packer. His wages were RM8.50 per day with additional shift allowance of 75 sen p.d. if he worked the 2nd shift and RM1.25 p.d. if he worked the 3rd shift and double pay if he worked on a rest day. He worked 26 days in the month of August 1986 including 3 rest days and was paid RM272.50 for that month. He worked only 7 days in the month of September 1986 and was paid RM66.75. He stopped work on 13 September 1986 (when he was due to work the 2nd shift from 3.00 p.m.) because of the accident that day at 2.00 p.m. where he lost his right leg which had to be amputated above the knee. He has been unemployed ever since although he tried to obtain alternative employment after being fitted with an artificial leg.

The learned Judge in awarding damages held:

> Loss of future earnings.
> I accept plaintiff was earning RM310 p.m. That is his loss. I award a percentage loss of 70%. He was 24 years old at the relevant time. I use a multiplier of 16 years that is 192 months. Deducting 20 months we have 172 months RM310 x 70% x 172 months - RM37,324.

plus interest at 8% from date of judgment to date of realisation.

Mr. Nathan says the monthly earnings is RM282.50 from which should be deducted a sum of RM185 for:

(i) Petrol consumption - RM 60
(ii) RM5 a meal per day for 25 days RM125

thereby leaving a sum of RM97.50 say RM100; and the award should be RM100 x 172 months = RM17,200. The award of RM37,324 should therefore be reduced to RM17,200. This deduction in living expenses is in accordance with s. 28A(2)(c)(iii) of the Civil Law Act 1956. Mr. Gunasegaran says the plaintiff's monthly earnings should be calculated on the basis that he worked 30 days a month and that it should be RM339.25. He further said s. 28A(2)(c)(iii) does not apply. The learned Judge based the monthly earnings of RM310 on the evidence of plaintiff's employer who said that if plaintiff worked for a full month his wages would be RM310. He did not work a full month in August and that was why he received less.

We see no reason to differ from the learned Judge's finding on this point.

In view of the arguments placed before us, we think it is necessary to reproduce s. 28A in its entirety for ease of reference and to enable it to be read as a whole. Section 28A(1) came into effect on 30 May 1975 and s. 28A(2) came into effect on 1 October 1984.

Section 28A states:

(1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account -

(a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act.

(b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

(2) In assessing damages under this section -

(a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the Court shall take into account:

(i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured.

(d) in assessing damages for loss of future earnings the Court shall take into account that:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

In *Tan Kim Chuan & Anor. v. Chandu Nair a/l Krishna Nair* [1991] 1 CLJ (Rep) 441 at p. 445 this Court said:

> The marginal note to s. 28A which reads "Damages in respect of personal injuries" suggests that the provisions are exhaustive and mandatory.

The question is whether s. 28A(2)(c)(iii) applies to the facts of this case.

The Act separates the method of assessing damages as to whether the plaintiff dies or survives from his injuries as follows:

(a) *Fatal Accident Cases*

If the death of a person is caused by the wrongful act, neglect or default of another person, then compensation to the family of the deceased person for loss occasioned by his death may be claimed under s. 7, which also provides how such damages are to be assessed.

(b) *Personal Injury Cases*

In respect of personal injury which does not result in death, the assessment of damages is governed by s. 28A.

Subsection (1) provides that any monies payable under (a), (b) or (c) shall not be taken into account.

Subsection (2) provides the method of assessing damages in such cases. What concerns us presently is subsection (2)(c)(iii) which states:

> in awarding damages for **loss of future earnings** the Court **shall** take into account:
>
> (iii) any **diminution** of any **such amount** as aforesaid by such sum as is proved or admitted to be the **living expenses** of the plaintiff at the time when he was injured;

Such amount referred to in (iii) is the amount of his **earnings** at the time of the injury referred to in (ii).

The diminution referred to in (iii) is the **living expenses** of the plaintiff at the time he was injured.

On a plain reading of the subsection we are of the view that by the use of the word **diminution** in (iii) the intention of the legislature is that in awarding damages for loss of future earnings **the entire sum of his earnings** should not be used to calculate the amount payable under subsection 2(c). In the instant case that sum is RM310 p.m. This diminution, however, is subject to proof by the defendant or admitted by the plaintiff. There is no proof here because the defendant did not give evidence. The plaintiff did give evidence and he said that:

(a) He went to work by motor-cycle and spent RM60 p.m. on petrol.

(b) His meals at work cost him RM5 p.d.

Mr. Nathan says both these items are living expenses under (iii). Mr. Gunasegaran says living expenses can only be deducted if a person is dead, if alive he needs living expenses in order to live. We cannot accept Mr. Gunasegaran's argument, because s. 28A is clearly intended for a living plaintiff and therefore s. 28A(2)(c)(iii) applies to the facts of this case.

What then is meant by **living expenses** in (iii). It is trite law that words in a statute must be given their ordinary meaning. *The Shorter Oxford English Dictionary* defines 'living' as: "The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance."

"Expenses" means "Money out of pocket".

In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted: See *Amar Singh v. Chin Kiew* [1960] MLJ 77 CA. This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in s. 7(3)(iv)(c) which came into force on 1 October 1984 and states:

> In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
>
> (c) take into account any diminution of any such amount as aforesaid by such sums as is proved or admitted to be the living expenses of the person deceased at the time of his death.

It will be seen that the same language is used in both s. 7(3)(iv)(c) and s. 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in s. 7 and s. 28A bear the same meaning.

In *Harris v. Empress Motors Ltd.* and *Cole v. Crown Poultry Packers Ltd.* [1983] 3 All ER 561, the Court of Appeal held that:

(i) the ingredients that go to make up 'living expenses' are the same whether the deceased was young or old, single or married, or with or without dependants;

(ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of life appropriate to his situation;

(iii) any sums that he would have expended exclusively to maintain or benefit others will not form part of his living expenses and will not be deductible from his net earnings.

In *White v. London Transport Executive* [1982] 1 All ER 410, Webster J said at p. 418:

> ... in the cost of maintaining himself I include the cost of his housing, heating, food, clothing, necessary travelling and insurances and things of that kind ...

Where no details are given as to the deceased's living expenses, the Court of Appeal in *P.R. Panickar v. Chwee May Kwong & Anor.* [1958] MLJ 136 made an arbitrary deduction of RM50 p.m. as the deceased's living expenses out of monthly earnings of RM250.

In the instant case, the appellants rely on the respondent's admission that he spent RM60 p.m. on petrol to go to work and RM5 p.d. for meals while at work as his living expenses which should be deducted in assessing damages for loss of future earnings under s. 28A(2)(c)(iii). We agree that this is a fair deduction in the circumstances of this case. The appeal on quantum is allowed. For purposes of calculation, however, the RM5 p.d. for meals should be multiplied by 26 as that is the number of normal days of work in a month under the Employment Act 1955. The order of the learned Judge in respect of post-trial loss of earnings of RM37,324 is hereby reduced to RM20,640 calculated as follows:

(i)	Petrol p.m		RM60
(ii)	Meals at RM5 p.d. x 26	=	RM130
	Total	=	RM190
	Monthly earnings	-	RM310
	Less living expenses	-	RM190
	Loss of future earnings		RM120 x 172 months
		=	RM20,640

For the reasons stated, we allow the appeal in part with half costs.

Deposit to be refunded to the appellants.

Also found at [1992] 4 CLJ 1939